BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD F. STAIR	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,046,724
XTREME TRANSPORTATION	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY UNKNOWN	)	
Insurance Carrier	)	

ORDER

Respondent appeals the September 9, 2009, preliminary Order For Compensation of Administrative Law Judge Brad E. Avery (ALJ). Claimant was found to have suffered an accidental injury which arose out of and in the course of his employment with respondent. Claimant was awarded medical treatment and temporary total disability compensation (TTD).

Claimant appeared by his attorney, Michael G. Patton of Emporia, Kansas. Respondent and its insurance carrier appeared by their attorney, Abagail L. Pierpoint of Kansas City, Missouri.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held September 4, 2009, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer an accidental injury which arose out of and in the course of his employment with respondent? Claimant testified that he suffered the bite of a brown recluse spider while sleeping in the cab of one of respondent's semi-trailer

trucks. Respondent alleges that claimant has failed to prove that the problem with the second toe on his right foot was caused by a spider bite.

2. Did the ALJ err in awarding TTD and medical treatment for an injury which arose out of and in the course of claimant's employment with respondent? Respondent argues that claimant failed to prove that the past medical treatment is causally related to the alleged work-related injury on June 25, 2009.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary Order For Compensation should be affirmed.

Claimant has been a truck driver for about 41 years. On May 17, 2009, he obtained employment with respondent as an over-the-road trucker. The tractor which claimant was provided had not been used for a couple of months and had to be jump-started when claimant was first provided the truck. Claimant also noted that there were several spiders in the truck. He advised the lead driver, Bill Marsh, and was told to get some spray for the cab. Claimant bought the spray and sprayed the inside of the cab. On a date uncertain, claimant saw one surviving spider in the cab, but does not remember exactly when this occurred. Claimant was able to positively identify the spider he saw in the cab of the truck as a brown recluse spider.

On Wednesday, June 24, 2009, claimant was traveling to Pennsylvania in that truck. He slept in the cab of the truck that night. The next morning, he awoke with a sore toe. He described the toe as having a red spot and a little black dot on the end of the toe. Claimant continued to travel for respondent, and the toe progressively worsened to the point that within two days, claimant was driving with a house slipper on his right foot. By the Sunday after the accident, claimant's second toe on his right foot was black, was beginning to smell and was draining. The toe was very painful. Claimant advised respondent of the worsening condition and was asked to drive to Nashville, Tennessee. There, claimant was met by two of his brothers, one of which is a licensed EMT. That brother advised claimant that he had been bitten by something. Claimant asked that they drive him back to Kansas, which they did. Claimant acknowledged that he did not see a spider on the 24th or 25th when he thought he had been bitten. He did have a spider crawl on his face as he slept in the sleeper cab. This was after he had sprayed the cab of the truck.

Claimant was taken to Newman Regional Health center in Emporia, Kansas, and was attended in the emergency room by Robert F. Dorsey, M.D. Claimant was immediately admitted to the emergency room and into the hospital the next day.

Claimant's toe, foot and leg had swollen to the point that they almost could not get his pants off in the emergency room. Claimant's toe was then amputated. Claimant remained in the hospital for several days.

The admission records at Newman Regional Health do not mention a spider bite. Claimant did testify that he mentioned the bite to Dr. Dorsey. But, the doctor said the toe was so badly deteriorated that he was unable to make a diagnosis as to the cause of the injury. The intake medical report does mention claimant having a history of erythema for about one month before his admission to the hospital. Claimant acknowledged that Dr. Dorsey had treated his second toe on his right foot for a blister in February or March 2009. The blister was caused by a pair of cowboy boots. Claimant denies saying that he had swelling for about a month prior to the admission date. The medical report also discusses diabetes with peripheral circulatory manifestations and neurological manifestations. But claimant has no idea what is meant by those diagnoses. He denies ever having problems with his extremities due to diabetes. It is also noted that the discharge summary fails to discuss a spider bite. Claimant described the bite as being near the tip of the toe, and not on the bottom.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[1]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[2]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[3]

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[1] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[2] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[3] K.S.A. 2008 Supp. 44-501(a).

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[4]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[5]

There is no dispute that claimant was occupying a truck cab that had, in the past, been inhabited by brown recluse spiders. Even though claimant had sprayed the cab, at least one spider survived the spray, as claimant awoke to find a spider crawling on his face in the cab during a nap. The medical records fail to mention a spider bite, but the records in evidence are sparse and obviously incomplete. There are also several medical conditions discussed in both the intake and release documents from the hospital. Claimant's testimony that he discussed the possibility of a spider bite with Dr. Dorsey is credible, as noted by the ALJ in the Order wherein he states that claimant is a "highly credible witness". Likewise, the testimony describing the progression of the condition of the toe after the incident in the cab is persuasive. The existence of spiders in the cab, coupled with claimant's testimony regarding the progression of his toe's condition, convinces this Board Member, for preliminary hearing purposes, that claimant did suffer a spider bite on the night of June 24, 2009, and awoke on the morning of June 25, 2009, in the cab of respondent's truck with a sore toe and evidence of that bite. The preliminary finding that claimant suffered an accidental injury which arose out of and in the course of his employment is affirmed.

Respondent also argues that the ALJ erred in awarding medical treatment and TTD for the toe injury.

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[4] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[5] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[6]

The dispute regarding the award of medical treatment and TTD are not issues over which the Board takes jurisdiction on an appeal of a preliminary hearing order. Once the issue of causation is determined, the issues dealing with TTD and ongoing medical treatment are rendered moot. Respondent's appeal of these issues is dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[7] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven that he suffered an accidental injury which arose out of and in the course of his employment with respondent on June 25, 2009. The award of benefits by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation of Administrative Law Judge Brad E. Avery dated September 9, 2009, should be, and is hereby, affirmed.

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[6] K.S.A. 44-534a(a)(2).

[7] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of November, 2009.

HONORABLE GARY M. KORTE

c: Michael G. Patton, Attorney for Claimant
Abagail L. Pierpoint, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge